OPY

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 647.

IN THE MATTER OF THE PROCEEDINGS TO ENFORCE DELINQUENT MONEY AND CREDITS TAXES FOR 1934.

FIRST BANK STOCK CORPORATION,

Appellant,

vs.

STATE OF MINNESOTA,

Appellee.

BRIEF OF APPELLEE.

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Appellee.

BRIEF OF APPELLEE.

DECISION TO BE REVIEWED.

This appeal brings up for review a judgment of the Supreme Court of the State of Minnesota, in which that court overruled the contention of appellant that the taxation by Minnesota of certain stock owned by appellant in state banks in Montana and North Dakota is contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States (R. 105-118).

THE FACTS.

The case was submitted on an agreed statement of facts (R. 15, 78). Appellant, First Bank Stock Corporation, is a Delaware corporation, with its principal office in Minneapolis, Minnesota (R. 15, 18, 19). Since its organization in 1929 all of its business has been conducted in Minnesota. All meetings of stockholders, directors, and of the executive committee of its board of directors have been held in Minneapolis or St. Paul (R. 21). All of the policies of the appellant were formulated and all its activities were directed from its offices in Minnesota. Its corporate seal was at all times kept at its office in Minneapolis (R. 21). Banks in Minneapolis and St. Paul acted as the transfer agent and registrar of its stock (R. 24). Dividends on its stock were paid from its office there (R. 24).

In April, 1929, the First National Bank in Minneapolis and First National Bank of St. Paul caused a corporation to be organized under the laws of Delaware with the name of First Bank Stock Investment Co., which corporation obtained a license to transact business in Minnesota April 19, 1929 (R. 18). Stock of this corporation was issued in equal proportions to and owned by First Minneapolis Co. and First St. Paul Co., the stock of each of which corporations was owned by trustees for the benefit of persons who were stockholders in the above named banks respectively (R. 18). First Bank Stock Investment Co. during the summer of 1929, acquired for cash a majority of the stock of some 17 national and state banks located in the 9th Federal Reserve District (R. 18). In August, 1929, the corporate name of the corporation was changed to First Bank Stock Corporation, and it made an offer of its stock to the stockholders of First National Bank in Minneapolis, the First National

Bank of St. Paul, Metals Bank & Trust Co. of Butte, Montana, First National Bank of Great Falls, Montana, and Wester National Bank of Missoula, Montana, in exchange for the stock of said banks held by them, which offer was accepted and the exchange consummated on October 31, 1929 (R. 18).

During the fall of 1929 and the year 1930, appellant acquired the stock of approximately 110 banks, trust companies and other financial institutions, all located in the 9th Federal Reserve District, and in the year 1931, the stock of 17 banks was acquired (R. 18-19). Since 1931, appellant has not acquired stock in any additional banks (R. 19). However, appellant has effected certain consolidations and eliminations, with the result that the number of banks in which appellant now holds stock has been reduced to 84, including one trust company (R. 22). Approximately 43 of such banks are located in Minnesota (R. 22).

The stock of such banks and other institutions was acquired in one of two ways, either (1) for cash or by exchange of shares of First Bank Stock Corporation for such shares, or (2) in a number of instances by the organization of new banking institutions, which assumed the liabilities and took over the assets of existing banks and in a few instances by the organization of a new bank which had no connection with any existing banking institution (R. 19, 20). In a majority of such instances all of the stock of such banks or financial institutions was acquired by the appellant, but in some instances the shares acquired were less than all of the outstanding shares (R. 20). Upon acquiring shares in such banks, First Bank Stock Corporation, in most instances, sold qualifying shares to directors and took options to repurchase such shares at cost (R. 20).

Among the banks whose shares were acquired by the ap-

pellant were eight state banks organized under the laws of Montana and North Dakota, taxation of the stock of which is in controversy here (R. 16, 17). These shares are kept at its Minneapolis office. The shares in these banks which were owned by the appellant on May 1, 1934, were assessed to it for that year at the total value of $1,027,095.95 (R. 16).

From about the beginning of 1930 until December 31, 1931, the appellant from its offices in Minnesota periodically examined and audited the banks in which it held stock, received reports of the operations of the banks and advised the banks with reference to accounting practices, the making of loans, the purchase of securities and commercial paper and at times furnished them with advertising material and in a number of instances acted as the agent of the banks in the purchase and sale of securities and commercial paper (R. 20). Shortly prior to January 1, 1932, the appellant caused to be organized a Minnesota corporation under the name of First Service Corporation, which is a wholly owned subsidiary. The appellant then entered into a contract with this subsidiary to perform all the services last mentioned for it in connection with the banks in which it owned stock (R. 21). The principal office of the subsidiary is in Minneapolis, Minnesota (R. 21).

The appellant also owns certain notes receivable which were obtained by it in connection with the sale of stocks owned by it or were purchased from banks in which appellant held stock. Appellant owns and holds certificates of deposit issued by certain member banks and as required by the Banking Act of 1933, holds certain U. S. government and other bonds. The appellant also holds cash which is on deposit in its accounts in two Minnesota banks and owns certain real estate which it obtained by reason of the liquidation of banks in which it formerly held stock. The appellant

owns the stock of two nonbanking corporations, mainly the First Service Corporation above mentioned and First Minneapolis Company, a Minnesota corporation, whose principal activity is the liquidation of real estate acquired and later charged off by First National Bank in Minneapolis (R. 22, 23). The appellant and First Service Corporation occupy the same offices. In 1931 and thereafter, the appellant contributed approximately $8,000,000 to the capital of its various member banks (R. 23-24).

The appellant made a voluntary return to the assessor of the city of Minneapolis of all its taxable money and credits with the exception of the bank stock here in question, in the sum of $2,040,634.05. Thereafter, the city assessor arbitrarily increased the amount of appellant's tax on money and credits by adding thereto the true and full value of the state bank shares in the amount of $1,027,095.05 (R. 15, 16, 17). The latter is the contested item in this case.

SUMMARY OF ARGUMENT.

POINTS.

I.

The right of a state to tax property within its territorial jurisdiction is inherent and an attribute of sovereignty.

II.

This Court, in the process of developing a symmetrical system of preventing multi-state taxation of the same economic interest, has laid down certain rules by which the right of a given state to tax intangibles is to be determined.

III.

The facts in this case bring the property here in question, under the rules as formulated, within the jurisdiction of the State of Minnesota.

(a) The owner has a "commercial domicile" in Minnesota.

(b) The property is physically present in that State.

(c) The owner has given the property a business situs there by employing it within that State, in the conduct of a super banking business, which is a new and important economic unit.

IV.

Minnesota has a constitutional right to tax the property in question.

V.

Appellant's position is untenable in the light of recent decisions of this Court.

VI.

The right to tax stock in state banks rests on fundamentally different considerations from the right to tax national bank stock.

Point I.

The Right of a State to Tax Property Within Its Territorial Jurisdiction Is Inherent and an Attribute of Sovereignty.

This fundamental principle of law was stated by this Court in *Pullman Palace Car Co. vs. Pennsylvania*, 148 U. S. 18, 11 S. Ct. 876, 35 L. Ed. 613, as follows:

> "No general principles of law are better settled or more fundamental than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the law of another State."

Mr. Cooley in his work on Constitutional Law (7th Ed.) on page 678, says:

> "The power to impose taxes is one so unlimited in force and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation; to every object of industry, use or enjoyment; to every species of possession; and it imposes a burden which, in case of failure to discharge it, may be followed by seizure and sale or confiscation of property. No attribute of sovereignty is more pervading."

Point II.

THIS COURT, IN THE PROCESS OF DEVELOPING A SYMMETRICAL SYSTEM OF PREVENTING MULTI-STATE TAXATION OF THE SAME ECONOMIC INTEREST, HAS LAID DOWN CERTAIN RULES BY WHICH THE RIGHT OF A GIVEN STATE TO TAX INTANGIBLES IS TO BE DETERMINED.

In recent cases it has:

1. Held the doctrine of *mobilia sequuntur personam* applicable to the taxation of intangibles. *Safe Deposit & Trust Co. vs. Virginia*, 280 U. S. 83, 50 S. Ct. 59, 74 L. Ed. 180; *The Farmers Loan & Trust Co. vs. Minnesota*, 280 U. S. 204, 50 S. Ct. 98, 74 L. Ed. 371; *Baldwin vs. Missouri*, 281 U. S. 586, 50 S. Ct. 436, 74 L. Ed. 1056; *Beidler vs. South Carolina Tax Commission*, 282 U. S. 1, 51 S. Ct. 54, 75 L. Ed. 131; *First National Bank of Boston vs. Maine*, 284 U. S. 312, 52 S. Ct. 174, 76 L. Ed. 313.

2. Noted an important exception where property has been given a business situs in another State. *Wheeling Steel Corporation vs. Fox*, 298 U. S. 193, 56 S. Ct. 773, 80 L. Ed. 1143:

> "Third. The corporation established in West Virginia what has aptly been termed a 'commercial domicile.' It maintains its general business offices at Wheeling and there it keeps its books and accounting records. There its directors hold their meetings and its officers conduct the affairs of the corporation. There, as appellant's counsel well says, 'the management functioned.' The corporation has manufacturing plants and sales offices in other states. But what is done at those plants and offices is determined and controlled from the

center of authority at Wheeling. The corporation has made that the actual seat of its corporate government."

* * * * * * * * *

"In the light of this course of business as shown by the agreed statements of fact, we find no sufficient basis for concluding that the bank accounts thus maintained and controlled were properly attributable to the corporation at any place other than at its general office at Wheeling."

3. Said that when we speak of business situs of intangible property in the taxing State "we express the idea of localization by virtue of the attribute of the intangible right in relation to the conduct of affairs at a particular place. The right may grow out of the actual transactions of a localized business or the right may be identified with a particular place because the exercise of the right is fixed exclusively or dominantly at that place. In the latter case the localization for the purpose of transacting business may constitute a business situs quite as clearly as the conduct of the business itself." *People of State of New York ex rel. Whitney vs. Graves, et al.*, ... U. S. ...., 57 S. Ct. 237, ... L. Ed. ..... (Decided January 4, 1937.)

4. Rejected the contention that the situs of intangibles is fixed at the location of the property out of which the intangible rights arose. *Farmers Loan & Trust Co. vs. Minnesota*, 280 U. S. 204, 50 S. Ct. 98, 74 L. Ed. 371.

In this connection the Minnesota Supreme Court in this case said:

"Stock shares no less than corporate bonds are choses in action attended by obligations of the corporation to the owners of them. Stock certificates evidence those duties as truly as do bonds the promise to pay principal

and interest. In both, the corporation is the obligor, the holders the obligees. As to corporate bonds, the chartering state cannot tax them when owned beyond its own boundaries. It cannot give them a situs for taxation apart from the domicile of the owner.

How are stock and stock certificates so different that state power may do for and with them what it cannot do for and with bonds? If it cannot by a mere legislative assertion localize the bonds for taxation, upon what theory—under what formula—may it localize the stock for the same purpose? Even if realism be frankly discarded and fictions avowedly made the media of reasoning, it is apparent that any allowable fiction that fits either bonds or stocks is equally apt for the other" (R. 113, 114).

To this the case of *Senior vs. Braden,* 295 U. S. 422, 55 S. Ct. 800, 79 L. Ed. 1520, is not opposed, for the reason that it was held in that case that the trust certificates there under consideration represented interests in real estate and accordingly were taxable only in the state in which the real estate was located.

5. Affirmed the doctrine of *Hawley vs. City of Malden,* 232 U. S. 1, 34 S. Ct. 201, 58 L. Ed. 477, to the effect the jurisdiction to tax intangibles is not dependent upon the situs of the tangible property of a corporation. *Virginia vs. Imperial Coal Sales Co.,* 293 U. S. 15, 55 S. Ct. 14, 79 L. Ed. 171.

Point III.

The Facts in This Case Bring the Property Here in Question, Under the Rules as Formulated, Within the Jurisdiction of the State of Minnesota.

1. In regard to the character and localization of the appellant's business in the State of Minnesota, the State Court found as facts:

> "Defendant is a Delaware corporation admitted to this state (misquoted in record as domiciled in this state), with its principal office here. It owns all or a majority of the stock in about 84 national and state banks in the Ninth Federal Reserve District. These are its subsidiaries, managed by it from its principal office in Minneapolis. Their stocks are not held by defendant merely for investment. They are not dealt in or traded, but were acquired and are owned for the purpose of giving defendant plenary control over the banks. The subsidiaries are colloquially and politically characterized as 'chain banks.' They are managed, supervised, and periodically examined by defendant. It selects all their officers and dictates all their policies. Another subsidiary corporation or two are mentioned in evidence and argument, but there is nothing about them to change the essential facts concerning defendant's ownership and use of its bank stocks.
>
> Whatever may be said of its properties separately considered, defendant's business is a very important economic unit, which, as to headquarters and management, is localized in Minnesota, wherein also are many banks, both state and national, which it controls through stock ownership. Its corporate seal is kept at its Min-

neapolis office. All meetings of its stockholders, board of directors, and executive committee are held in Minneapolis or St. Paul. The certificates for its stocks in subsidiary banks are all kept at the Minneapolis office. Defendant regularly returns for taxation all its taxable money and credits, other than the stocks in state banks of other states. As to the latter, it denies that Minnesota has the power to tax them or itself as owner of them.

Presently involved are the stocks of six Montana and two North Dakota state banks. (The case is unembarrassed by any problem peculiar to the taxation of shares in national banks.) Defendant owns, as it does in most cases, all their stock, except qualifying shares in the ownership of the few directors and officers necessarily resident at the domicile of each bank. Even such shares are held by the owners subject to an option in defendant to repurchase at will" (R. 106-107).

Further, "Defendant in its corporate person is within its jurisdiction and subject to the state's taxing power" (R. 108).

A particularly important feature of the appellant enterprise as conducted in the State of Minnesota is that it employs its ownership of the stocks of the various banks in Minnesota, Montana and North Dakota in the operation of a super banking institution from its general offices in Minnesota. In connection with this integrated or unitary use of the stocks of the several banks, the Supreme Court of the State of Minnesota said:

"There is another and important feature of this case, not present in the inheritance tax cases. It is that the stocks of the eight Montana and North Dakota state

banks, upon which this state seeks to levy a money and credits tax, have, by reason of their ownership and use by defendant, with the stocks in 76 other banks, an importance in use and value, local in nature, which they would not possess if the stock in each of defendant's subsidiary banks were considered in isolation as a unit by itself. The stocks in defendant's subsidiaries, themselves numerous and scattered widely through the Ninth Federal Reserve District, have been amalgamated into a superbanking and economic unit in defendant's ownership and control. Thereby, there has arisen a new power over the banking activities and interests of a large and important area. Whatever the increment of value resulting therefrom, it is undeniable that together they make a new unit of highly important and valuable property, integrated and with a situs here or nowhere" (R. 111, 112).

The State Court further refers to "The established local business situs of defendant's bank stocks and their unitary use" (R. 112). And again after referring to the fact that the bank stocks are owned here, says in this connection: "More important is the fact that they are here an integrated part, and the main one, of a distinctly localized unit of business, property and value" (R. 112, 113).

It is the appellee's contention that these facts bring this case clearly within the doctrine of *People of State of New York ex rel. Whitney vs. Graves, supra,* where this Court said: "When we speak of a 'business situs' of intangible property in the taxing state we are indulging in a metaphor. We express the idea of localization by virtue of the attributes of the intangible right in relation to the conduct of affairs at a particular place. The right may grow out

of the actual transactions of a localized business or the right may be identified with a particular place because the exercise of the right is fixed exclusively or dominantly at that place."

In so far as the rights of the appellant in the stocks of the various banks are employed in this new unit of business, they are employed solely within the state of Minnesota. And we think it is fair to say that of particular importance to the appellant is the right to control the operation of the banks through the unitary employment of the certificates, which right is exercised exclusively in the State of Minnesota. From this the Supreme Court of the State of Minnesota concluded: "If stocks can ever have an actual or 'business situs' in a State other than that of the corporation itself, there is such a situs of defendant's shares in Minnesota" (R. 111). And that such shares in their integrated and unitary use and employment have a "situs here or nowhere" (R. 112).

2. The rules, so far laid down by this Court for the purpose of determining the jurisdiction of a state to tax intangibles, operate to the exclusion of a similar right in other states in the particular circumstances considered in those cases, and while the ultimate result may be that no two states can tax the same economic interest as represented by an intangible right, that result has not as yet been reached in the process, unless the language of the Wheeling case is to be so construed. It is true in that case this Court said "And having thus determined 'that in general intangibles may be properly taxed at the domicile of their owner,' we have found 'no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles.'" And in *State*

of New York ex rel. Whitney vs. Graves, supra, in referring to *Citizens National Bank vs. Durr,* 257 U. S. 99, 42 S. Ct. 15, 66 L. Ed. 149, said "and what the court said with respect to double taxation must be read in the light of the decisions in *Farmers Loan & Trust Co. vs. Minnesota, supra,* and later cases upon that point." Yet it has not said that under no circumstances may the same economic interest be taxed in more than one state.

The instant case is illustrative of the manner in which the same economic interest may be differently employed. In the hands of an individual owner a certificate of stock in one of these banks would have certain well defined rights and attributes. The same certificate owned together with a majority of shares in the several banks and controlled by a corporation such as the one under consideration, takes on as incidents of ownership much greater if not entirely new rights and attributes.

If reference to the "dominant attribute" of intangibles in *Whitney vs. Graves* indicates that this Court will search out the dominant attribute of an intangible, and having determined the place where that attribute is principally exercised or employed, fix the "business situs" at that place, then we feel that the judgment of the State Court in this case must necessarily be affirmed.

The situs of the bank stocks owned by the appellant certainly are as completely localized in Minnesota as were the securities held to have a situs in Pennsylvania in *De Ganay vs. Lederer,* 250 U. S. 376, 39 S. Ct. 524, 63 L. Ed. 1042.

No doubt the broad doctrine of the case of *Corry vs. Baltimore,* 196 U. S. 466, 25 S. Ct. 297, 49 L. Ed. 556, will have to be revised if not overruled in the light of the recent decisions of this Court. In this connection, in deciding the instant case, the Supreme Court of Minnesota said:

"The power of the domiciliary state to subject nonresident owners of corporate stock to taxation rests upon its supposed power (sustained in *Corry vs. Baltimore*, 196 U. S. 466, 25 S. Ct. 297, 49 L. Ed. 556), in creating the corporation, to fix 'the situs' of all its stock, wherever owned, for purposes of taxation. If it may so establish one situs, why may it not be made the only one?

If the domiciliary states have the power, by taxing the shares in their corporations, to exclude all taxation thereof by other states wherein the owners reside, why may they not do so by exempting such shares from all taxation? Suppose, for example, that Montana and North Dakota, instead of taxing bank stocks, taxed only the corporations as such and expressly had declared that the shares should be exempt. It is a question of the reach of sovereign power, and, whatever sovereign power may do by affirmation, it should be able to accomplish by equally significant negation.

If the home state may fix a situs for property taxation, why may it not do that same for excises? Why may it not declare that it shall be the only state to tax the transfer of stock on the death of even nonresident owners? That it cannot do so now seems to be established. It has never been suggested that the home state could declare itself the only one to take by escheat the shares of nonresident owners dying intestate and without heirs. Equally beyond the scope of legal thought, is the idea that a state may so monopolize the situs of stocks as to declare that, wherever owned, they will descend, on the death of the owner, under its own law and no other.

The domiciliary state of a corporation, of course, may

tax it as a corporation. The company and its local property of all sorts are taxable in the home state. But, if that state may tax also the special property of non-residents in their shares, it is by so much taxing property and persons beyond its jurisdiction. In such case, the home state is in fact taxing beyond its boundaries unless the foreign holders of the shares have no property therein which they can carry with them anywhere, for any purpose, beyond the territory of that state.

But, it may be rejoined, a state upon enfranchising a corporation may condition as it wishes all corporate activities and all use and ownership of its shares. So it may if there are no limits to its power. Let it be supposed there are none as to the corporation itself, which is made a legal person by and of the state of incorporation. But what of shareholders in other states? The domiciliary state cannot tax them *in personam*, in respect to and on their separate interests, unless it may so condition the issue of shares by the corporation. It may condition issue, transfer, and ownership of shares within constitutional limits. But, is it not going beyond its jurisdiction by imposing a condition which is intended to operate, and in practice can operate, only on subjects, property and its owners, in other states?

How far may a state condition a corporation it enfranchises and the stock and stockholders therein? It may limit powers and confine their exercise to its own domain. But if it permits its corporation to go into other states, corporate action in the latter will be governed by local law. The original, domiciliary limitations of its power is congenital and inescapable. But in other respects a corporation does escape the laws of its home state whenever it becomes domiciled in another.

For the home state by the act of incorporation to attempt to permit its corporations to go into others and there to deny their jurisdiction, as by resisting otherwise appropriate taxation, would be plainly *ultra vires*.

Suppose, for example, a state says to its corporations: "You must pay a tax on all your tangible property wherever owned; subject to that condition, go into another state and do business there." Suppose the corporation does so and acquires tangible property in another state and keeps it there, its actual physical situs and use there and there only. It cannot escape taxation there. Must it pay also at home? Obviously not. Either a state must keep its corporations at home, or, permitting them to roam into other states, must acknowledge for the laws of the latter their full reach to and effect upon all proper subjects. If the state of incorporation cannot so condition its corporations going into other states, how may it impose similar conditions upon stockholders and their property beyond its own jurisdiction?" (R. 114, 115, 116).

Point IV.

Minnesota Has a Constitutional Right to Tax the Property in Question.

"The jurisdiction of Minnesota to tax at all is challenged, and the supporting argument must rest, finally, not so much upon the fact of taxation in other states as on their supposed exclusive power to tax, whether exercised or not, and in the supposed lack of power in Minnesota to tax at all." Op. Minn. Supreme Court (R. 109).

In *Hawley vs. Malden*, 232 U. S. 1, 34 S. Ct. 201, 58 L. Ed. 477, the question presented was whether the taxation of shares of stock owned by a resident of Massachusetts, in a foreign corporation, which did no business and had no property in that state, was a denial of due process. It was decided in the negative. A distinction was drawn by the court between the property of the shareholders in their shares and that of the corporation itself. The former "may be separately taxed." The court sustained the power of the state of the owner's domicile to tax the shares and adopted "the view that shares are personal property, and, having no situs elsewhere, are taxable by the state of the owner's domicile, whether the corporations be foreign or domestic." The contention that the shares were "taxable solely in the state of incorporation" was rejected and the power of the state of the owner's domicile to tax them sustained.

In commenting on the case of *Hawley vs. Malden*, the Supreme Court of Minnesota said:

> "Upon the question of situs, we shall have more to say later, but in *Hawley vs. Malden, supra*, the court said: 'When we are dealing with the intangible interest of the shareholder, there is manifestly no question of physical situs, so far as this distinct property right is concerned, and the jurisdiction to tax it is not dependent upon the location of the lands and chattels of the corporation.'
>
> Further, in respect to corporate shares, the court held that, as choses in action such shares 'in the absence of legislation prescribing a different rule * * * are appropriately related to the person of the owner, and, being held by him at his domicile, constitute property with respect to which he is under obligation to con-

tribute to the support of the government whose protection he enjoys.'

Upon the authority of *Hawley vs. Malden*, and deciding the question strictly as one of federal constitutional law, we hold that the taxation in Minnesota, as attempted under our money and credits tax law, of the involved stocks in the Montana and North Dakota banking corporations, is not a denial of due process. *Bristol vs. Washington County*, 177 U. S. 133, 20 S. Ct. 585, 44 L. Ed. 701; *New Orleans vs. Stempel*, 175 U. S. 309, 20 S. Ct. 110, 44 L. Ed. 174; *Metropolitan Life Ins. Co. vs. New Orleans*, 205 U. S. 395, 27 S. Ct. 499, 51 L. Ed. 853" (R. 109, 110).

Further, in this connection the Supreme Court of Minnesota in deciding this case said:

"If stocks can ever have an actual or 'business situs' in a state other than that of the corporation itself, there is such a situs of defendant's shares in Minnesota. 'It is difficult to conceive how property could be more completely localized.' See *De Ganay vs. Lederer*, 250 U. S. 376, 39 S. Ct. 524, 526, 63 L. Ed. 1042, where the 'localized' securities were in the possession and management of an agent in the United States for a nonresident alien owner. We stress again the real distinction between the incorporeal rights evidenced by the stock certificates, and the stock certificates themselves, the former being intangible and the latter tangible and dealt with as such. Compare *First Trust Company of St. Paul vs. Matheson*, 187 Minn. 468, 246 N. W. 1, 87 A. L. R. 478, holding that bonds payable to bearer are so far tangibles as to be properly subject to an action *quasi in rem* here. Under the rules of that case, and the others

therein cited, particularly *Hamilton vs. Brown*, 161 U. S. 256, 16 S. Ct. 585, 40 L. Ed. 691, there seems to be no question that, if the stocks in question were owned by an individual resident of Minnesota, and he should die here, intestate and without heirs, Minnesota jurisdiction would be the only one capable of adjudging the escheat of the certificates and the property rights thereby evidenced" (R. 111).

And again:

"The established local business situs of defendant's bank stocks and their unitary use here in a new integer of business and property furnish all the basis needed to support the challenged tax, for which we hold defendant liable" (R. 112).

To the extent that the situs of stock of a corporation has been localized in another state, it may be necessary to alter the doctrine of *Corry vs. Baltimore*.

"Exploring further defendant's argument anent double taxation, one answer is that there is no constitutional prohibition of duplicate taxation. There is a difference between twice taxing the same event which can happen in but one state, and twice taxing the same property, once in respect to an interest, or quality, or susceptibility, especially related to one jurisdiction, and again in respect to another as clearly related to the second taxing power.

The present trend of our law is against multiple state taxation of intangibles. If 'the employment of the due process clause of the Fourteenth Amendment to eliminate the multi-state taxation of intangible personalty' (Rottschafer, State Jurisdiction to Impose Taxes, 42 Yale Law Journal 305 (307), is to continue and evolve

into a symmetrical plan barring such taxation, there must be a re-examination, and probably an end of the present practice of states taxing the shares of their corporations in the ownership of nonresidents. Such levies, extraterritorial in practical effect, are an anomaly if not in fact *ultra vires.*"

Opinion of the Supreme Court of Minnesota (R. 113).

Point V.

Appellant's Position Is Untenable in the Light of Recent Decisions of This Court.

The decisions of this Court in *Farmers Loan & Trust Co. vs. Minnesota*, 280 U. S. 204, 50 S. Ct. 98, 74 L. Ed. 371; *First National Bank of Boston vs. Maine*, 284 U. S. 312, 52 S. Ct. 174, 76 L. Ed. 313; *Wheeling Steel Corporation vs. Fox*, 298 U. S. 193, 56 S. Ct. 773, and *State ex rel. Whitney vs. Graves*, 57 S. Ct. 237 (January 4, 1937), in particular, discussed under point 2 of this brief, we believe, fully sustain this contention.

In effect the position of the appellant is that the situs of stock in state banks at the place of incorporation is constitutionally superior to that of the place where the stock is owned, controlled and employed, so that its taxation in the latter place violates the due process clause of the 14th Amendment to the Federal Constitution.

Appellant contends that the exception to the domiciliary rule in favor of the place of business situs so clearly announced in the Wheeling case should have appended to it an exception to the effect that state bank shares are taxable only in the state where the bank is incorporated.

A practical consideration in this connection is whether the court in construing the due process clause of the constitu-

tion is to classify corporations according to the character of their business activities and say that the stock of some is taxable only in the state of incorporation and of others at the domicile of the owner or the place where the stock has been given a business situs.

The appellant recognized the fact that its assets had a business situs in Minnesota by returning for taxation all of its taxable money and credits, except the stock held by it in state banks. This is a significant recognition of the state's claim,

The position of the appellant in this case is quite analogous to that taken by the State of Minnesota and overruled by this Court in the Farmers Loan & Trust Company case. In that case the State of Minnesota contended that certain bonds and certificates of indebtedness issued by the State of Minnesota and some of its municipalities were subject to an inheritance tax although the owner was domiciled in New York, on the ground that the State of Minnesota protected the debt, compelled its payment and permitted its transfer.

This Court very early held the bonds of a corporation owned and held by nonresidents at their domiciles in other states are beyond the taxing power of the chartering state. *Cleveland, Paynesville & Ashtabula R. R. Co. vs. Pennsylvania*, 82 U. S. (15 Wall.) 300, 21 L. Ed. 170.

As the Supreme Court of the State of Minnesota pointed out in deciding the instant case:

> "Stock shares no less than corporate bonds are choses in action attended by obligations of the corporation to the owners of them. Stock certificates evidence those duties as truly as do bonds the promise to pay principal and interest. In both, the corporation is the obligor, the holders the obligees. As to corporate bonds, the

chartering state cannot tax them when owned beyond its own boundaries. It cannot give them a situs for taxation apart from the domicile of the owner.

How are stock and stock certificates so different that state power may do for and with them what it cannot do for and with bonds? If it cannot by a mere legislative assertion localize the bonds for taxation, upon what theory—under what formula—may it localize the stock for the same purpose? Even if realism be frankly discarded and fictions avowedly made the media of reasoning, it is apparent that any allowable fiction that fits either bonds or stocks is equally apt for the other" (R. 113, 114).

The arguments of practicability and convenience advanced by appellant under the circumstances of this case in view of the rules relating to the taxation of intangibles laid down by this Court are more properly addressed to the legislative than to the judicial branch of the government. Practicability and convenience no doubt may be properly taken into consideration in formulating rules of construction, but certainly cannot themselves be made the rule on which the constitutional right of a State to tax is to depend.

This Court is now engaged in the development of a symmetrical system of preventing multi-state taxation of the same economic interest. As pointed out by the Supreme Court of the State of Minnesota in its opinion in this case: "The asymmetry results from the inclusion in the tax structure of permission to a state, in organizing a corporation, to resort to an expedient of condition or regulation which in fact projects its own jurisdiction to property and persons beyond its boundaries" (R. 116).

Point VI.

The Right to Tax Stock in State Banks Rests on Fundamentally Different Considerations From the Right to Tax National Bank Stock.

1. The plain distinction between the taxation of stock in national banks and that of state banks is that the right of the states to tax the stock of national banks exists only by virtue of the permissive act of Congress, while the right to tax the stock of state banks is inherent in the state in which its owner is domiciled or has given it a business situs.

The right to tax national bank stock rests solely on the permissive act of Congress. Mere silence on the subject would be prohibitive. *First National Bank vs. Richmond,* 39 Fed. 309; appeal dismissed, 13 S. Ct. 1044, 149 U. S. 769, 37 L. Ed. 959; *First National Bank of Guthrie Center vs. Anderson,* 46 S. Ct. 135, 269 U. S. 341, 70 L. Ed. 295; *State vs. First National Bank,* 204 N. W. 874, 205 N. W. 375, 164 Minn. 235.

The Federal law on this subject was not intended to control the power of the state on the subject of taxation, but to protect the capital invested in national banks from unfriendly discrimination by the states in the exercise of taxing powers. *Adams vs. Nashville,* 95 U. S. 19, 20, 24 L. Ed. 369; *Mercantile National Bank vs. City of New York,* 28 Fed. 776; affirmed, 7 S. Ct. 826, 121 U. S. 138, 30 L. Ed. 895. It was intended to comprehensively control the subject with which it dealt and thus to furnish the exclusive law governing state taxation as to the federal agencies created by Congress. *Bank of California, National Association, vs. Richardson,* 248 U. S. 476, 39 S. Ct. 165, 63 L. Ed. 372.

"The purpose of the restriction (contained in this section as to the state authority to tax national banks) is to render impossible for any state, in taxing the shares, to create and foster an unequal and unfriendly competition with national banks by favoring shareholders in state banks or individuals interested in private banking or engaged in operations and investments normally common to the business of banking."

First National Bank vs. Anderson, 46 S. Ct. 135, 269 U. S. 341, 70 L. Ed. 295.

On the other hand the power of the state to tax property within its jurisdiction except property of the United States and its agencies is inherent.

2. Not by holding that state bank shares can be taxed at the place of incorporation will this Court eliminate the present confusion in the taxation of state and national bank shares.

Ever since the decision of this Court in *Merchants National Bank vs. Richmond* (June 6, 1921), 256 U. S. 635, 41 S. Ct. 619, 65 L. Ed. 1135, the taxation of the interest of stockholders in national banks by the states has been greatly confused. This confusion apparently resulted from the fact that prior to the decision in that case, the states apparently assumed that the only uniformity required was between the taxation of national bank shares and state bank shares. That the requirement of uniformity extended to "other moneyed capital in the hands of individual citizens of such state coming into competition with the business of national banks" apparently was overlooked and appears now to be overlooked by the appellant in this case.

The decision of this Court in the Richmond case was followed by several others, in which the laws of many states

relating to that subject of taxation were held invalid, on the grounds that they were discriminatory. (Minnesota) *State vs. First National Bank,* 273 U. S. 561, 47 S. Ct. 468, 71 L. Ed. 774; (Iowa) *First National Bank vs. Anderson,* 269 U. S. 341, 46 S. Ct. 135, 70 L. Ed. 295; (Oregon) *Brotherhood Co-op. National Bank vs. Hurlburt,* 21 Fed. (2d) 85; (Florida) *Roberts vs. American National Bank of Pensacola,* 97 Fla. 411, 121 So. 554; (Montana) *Commercial National Bank vs. Custer County,* 275 U. S. 502, 48 S. Ct. 155, 72 L. Ed. 395; (Wisconsin) *First National Bank vs. Hartford,* 273 U. S. 548, 47 S. Ct. 462, 71 L. Ed. 767; (Kansas) *Central National Bank of Topeka vs. MacFarland,* 20 Fed. (2d) 416, affirmed (C. C. A. 1928) 26 Fed. (2d) 890, certiorari denied 278 U. S. 606, 49 S. Ct. 12, 73 L. Ed. 533.

It is a well known fact that some of the states, of which Minnesota is one, have no valid legislation at the present time for the taxation of the interest of shareholders in national banks. Since the decision of this Court in *State vs. First National Bank,* 273 U. S. 561, *supra,* the State of Minnesota has not revamped its tax laws to conform with the holding of this Court in that case. (Taxation of bank stock, Sections 2026-1 to 2026-4, *Mason's Minnesota Statutes 1927;* mortgage registration tax, Section 2322, *Mason's Minnesota Statutes 1927;* money and credits tax, Section 2337, *Mason's Minnesota Statutes 1927.*)

Section 5219, Revised Statutes of the United States, as amended (since the Richmond case was decided), now permits the states to tax the interest of stockholders in national banks, by providing that, subject to certain conditions, "The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by

their net income, * * *." (Appendix 1.)

As a matter of fact the most orderly and uniform method of taxing the interest of stockholders in national and state banks and "other moneyed capital in the hands of individual citizens * * * coming into competition with the business of national banks" appears to be on an income basis. This is the method now employed by the following states which have made the most progress in bringing about complete uniformity in the matter of such taxation:

Alabama:

General Acts of Alabama, 1935, Act. No. 194 (Article XII, p. 428).

California:

General Laws of California, 1931 Deering Act 8488.

For amendments see 1933 Deering Sup., 1935 Deering Sup.

Idaho:

Chapter 159, Session Laws 1933.

Massachusetts:

Chapter 63, 1936 Cum. Sup.

Annotated Laws of Mass. (Vol. 2).

New York:

McKinney's Consolidated Laws of New York.

Book 59, Art. 9-C.

Oklahoma:

Session Laws 1935, Chapter 66, Article 6.

Oregon:

Chapter XIII, Oregon Code Annotated, Sup. of 1935.

Utah:

Revised Statutes of Utah, 1933, Chapter 13.

Washington:

Sections 11200-1 to 11200-70, Remington's Revised Statutes of Washington. (Law held unconstitutional as a property tax for lack of uniformity under Wash. Const. *Jensen vs. Henneford,* 85 Wash. Dec. 182, 53 Pac. (2nd) 607.)

Wisconsin:

Wisconsin Statutes 1935, Chapter 71; Wisconsin Statutes 1935, Section 7040.

Should the state of incorporation ultimately be denied the right to tax the stock of state banks under the circumstances that exist in this case, it will not be deprived of revenue from those banks. It may still tax the real estate, personal property and income of the corporations. This is also true as to the real estate and income of national banks. (See Appendix 1.) In this connection the Minnesota Supreme Court said:

> "The domiciliary state of a corporation, of course, may tax it as a corporation. The company and its local property of all sorts are taxable in the home state. But, if that state may tax also the special property of nonresidents in their shares, it is by so much taxing property and persons beyond its jurisdiction. In such case, the home state is in fact taxing beyond its boundaries unless the foreign holders of the shares have no property therein which they can carry with them anywhere, for any purpose, beyond the territory of that state" (R. 114, 115).

It must not be overlooked that the Congress can, at any time, change the law relating to the taxation of national banks and the interests of stockholders therein by altering the method or completely withdrawing the right, and thus

it may, at any time, upset any system of uniformly taxing national and state banks which presently may be established.

INCREMENT THROUGH AMALGAMATION.

It is plain that the Minnesota Supreme Court in referring to "increment of value" resulting from the employment of the shares by appellant in setting up a super banking institution (R. 111, 112), merely intended to emphasize the unitary use of the shares of stock as employed by the appellant in Minnesota, and to indicate that while such increment as arises out of that situation is not separately taxed in this case, it may, however, enter into the valuation of the stock as employed and taxed in that State.

When the Minnesota Supreme Court said, "We do regard as unimportant the fact that much of the supervision formerly exercised by respondent directly has been taken over by its wholly owned subsidiary, the 'First Service Corporation'" (R. 118), it evidently meant to indicate that the supervision of the banks was still exercised by the First Bank Stock Corporation through the subsidiary.

Appellee respectfully urges that the judgment of the State Court should be affirmed.

All of which is respectfully submitted:

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APPENDIX.

Taxation of National Banks.

Section 548, Title 12, U. S. C. A. (Revised Statutes, Sec. 5219, as amended Mar. 4, 1923, C. 267, 42 Stat. 1499, and as amended Mar. 25, 1926, C. 88, 48 Stat. 223.)

"548. State taxation.

The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: Provided, that bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured

by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: Provided, however, that a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by nonresidents of any State, shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in

any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of Section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section. (R. S. §5219; Mar. 4, 1923, C. 267, 42 Stat. 1499; Mar. 25, 1926, C. 88, 44 Stat. 223.)"